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In the Supreme Court of the United States

OCTOBER TERM, 1984

JOHN N. MITCHELL, PETITIONER

v.

KEITH FORSYTH

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether the collateral order doctrine permits an immediate appeal from an order denying a claim of qualified immunity in a *Bivens* suit on the ground that the legal standards allegedly violated were clearly established at the time in question.

2. Whether petitioner was entitled to qualified immunity in this case.

3. Whether the Attorney General is entitled to absolute immunity when he makes decisions in the area of national security.

PARTIES TO THE PROCEEDINGS

In addition to petitioner, the following parties were defendants in the district court: Richard G. Kleindienst; L. Patrick Gray, III; Albert Cooper; and E. Davis Porter. Respondent Keith Forsyth was the only plaintiff.

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v.

KEITH FORSYTH

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of John N. Mitchell, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-29a) is reported at 729 F.2d 267. The opinion of the court of appeals on respondent's motion to dismiss the appeal (App., *infra*, 31a-42a) is reported at 700 F.2d 104. The opinion of the district court (App., *infra*, 52a-77a) is reported at 551 F. Supp. 1247. The prior opinion of the court of appeals (App., *infra*, 83a-116a) is reported at 599 F.2d 1203. The initial opinion of the district court (App., *infra*, 44a-50a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered March 8, 1984. A petition for rehearing was denied on April 3, 1984 (App., *infra*, 81a-82a). On June 25, 1984, Justice Brennan extended the time for filing a petition for a writ of certiorari to and including August 31, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. At the time of the events leading to this litigation, 18 U.S.C. (1976 ed.) 2511(3)[1] provided in pertinent part:

> Nothing contained in this chapter * * * shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial[,] hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.

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[1] 18 U.S.C. (1976 ed.) 2511(3) was repealed by Section 201(c) of the Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1797. This statute, which established procedures for the conduct of electronic surveillance for national security purposes, was enacted eight years after the events that gave rise to this litigation.

STATEMENT

1. In June 1970, the Philadelphia office of the Federal Bureau of Investigation learned from a member of the East Coast Conspiracy to Save Lives (ECCSL) that the group was planning to destroy the underground utility tunnels serving a portion of the federal enclave in Washington, D.C., as a Washington's Birthday protest of the Vietnam War. The FBI also learned that the ECCSL already had been successful in carrying out several raids on draft board offices. In August 1970, the FBI further learned that three ECCSL members, including William Davidon, a professor at Haverford College, had discussed a plan to kidnap Henry A. Kissinger, then Assistant to the President for National Security Affairs, simultaneously with the destruction of the utility system. This latter information was conveyed to the White House in addition to the Attorney General. App., *infra*, 85a-86a, 120a-121a.[2]

After additional investigation, Attorney General Mitchell on November 6, 1970, approved the FBI Director's request to place a telephone surveillance on Davidon's home telephone. The primary purpose of this surveillance was to gather intelligence information about the ECCSL's plans, although it was anticipated that information of a criminal evidentiary nature might also be obtained. The wiretap was discontinued on January 6, 1971. During the surveillance, conversations between Davidon and respondent Keith Forsyth were overheard on three occasions. App., *infra*, 85a-86a.

At the time of the Davidon surveillance, the only two federal courts that had considered the question had held that

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[2] During his deposition in this case, Attorney General Mitchell recalled that Dr. Kissinger was provided Secret Service protection in light of the kidnap threat (Mitchell Dep. 60). At that time, Dr. Kissinger was engaged in secret peace negotiations with the North Vietnamese in Paris (Mitchell Dep. 60-62). These facts added a further dimension to the security concerns presented by the kidnap threat.

the President was permitted to order domestic security wiretaps without obtaining a warrant (see cases cited at App., *infra*, 23a). In *Katz* v. *United States*, 389 U.S. 347, 358 n.23 (1967), this Court had expressly reserved decision on whether national security surveillances generally required warrants, and conflicting views on the question had been expressed by individual Justices in concurring opinions. Compare *id.* at 359-360 (Douglas, J., joined by Brennan, J., concurring) with *id.* at 362-363 (White, J., concurring). The federal wiretapping statute also provided no definitive answer to this question. Shortly after *Katz* was decided, Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2520, to govern the use of wiretaps. However, a provision of that Act, 18 U.S.C. (1976 ed.) 2511(3), "ma[de] clear that the Act simply did not legislate with respect to national security surveillances." *United States* v. *United States District Court*, 407 U.S. 297, 306 (1972) (footnote omitted) [hereinafter cited as *Keith*].

2. After respondent Forsyth learned of the wiretap, he instituted this action in the United States District Court for the Eastern District of Pennsylvania against Attorney General Mitchell and two FBI employees who had installed and maintained the electronic surveillance.[3] Respondent sought damages for the three overhearings of his telephone conversations, claiming that the warrantless electronic surveillance violated Title III and the First, Fourth, and Ninth Amendments to the Constitution.[4]

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[3] Respondent also named as defendants former Attorney General Richard G. Kleindienst and former Acting FBI Director L. Patrick Gray III. These defendants' respective terms of office did not coincide with the period of the surveillance, and accordingly the claims against them were voluntarily dismissed in the district court.

[4] One other damages action based upon the Davidon surveillance is still pending against petitioner. That suit, *McAlister* v. *Kleindienst*, Civ. Action No. 72-1977 (E.D. Pa.), filed by Davidon and another person overheard on the surveillance, has been stayed pending disposition of appellate proceedings here. In another suit, which was based both upon the Davidon surveillance and another wiretap, the district court recently granted summary judgment for petitioner, holding that the illegality of the wiretaps was not clearly established at the time in question. *Burkhart* v. *Saxbe*, Civ. Action No. 74-826 (E.D. Pa. Aug. 23, 1984) (see App., *infra*, 143a-155a).

After discovery, which included the former Attorney General's deposition, a motion for summary judgment was filed urging that the case be dismissed on absolute and qualified immunity grounds. The district court denied this motion (App., *infra*, 117a-142a). The court held (*id.* at 134a-137a) that the Attorney General was not entitled to absolute immunity under *Imbler* v. *Pachtman*, 424 U.S. 409 (1976), because he was functioning as an administrator rather than as a prosecutor. The court also held (App., *infra*, 140a-142a) that the claim of qualified immunity could not be resolved on a motion for summary judgment. Applying the qualified immunity standard articulated in *Butz* v. *Economou*, 438 U.S. 478 (1978), the court concluded that there were genuine (but unspecified) issues of material fact "in connection with the defendants' affirmative defense of good faith" (App., *infra*, 142a).

3. On appeal from the denial of the motion for summary judgment, the court of appeals held that it had jurisdiction to review only the district court's denial of absolute immunity (App., *infra*, 89a-95a). On the merits of this issue, the court concluded (*id.* at 95a-111a) that, under *Butz* v. *Economou*, 438 U.S. at 515, the Attorney General is absolutely immune from personal damages liability for his official acts only when performing the functions of a prosecutor. The court rejected any notion that broader absolute immunity was needed to protect the Attorney General from harassing lawsuits because, in the court's view, "*Butz* * * * was unconcerned with this problem" (App., *infra*, 101a). The court of appeals remanded the case to the district court to consider whether, in authorizing the electronic surveillance challenged by respondent, the Attorney General was exercising a prosecutorial function or was engaged in "purely investigative or administrative function[s]" (App., *infra*, 111a). A petition for a writ of certiorari was denied (453 U.S. 913 (1981)), after this Court was unable to render an opinion on related immunity issues in *Kissinger* v. *Halperin*, 452 U.S. 713 (1981).

On remand, the district court again denied petitioner's claim to absolute immunity (App., *infra*, 54a-60a). The court also rejected petitioner's claim to qualified immunity

under the new legal standard articulated in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982) (App., *infra*, 60a-77a). The district court concluded that petitioner had violated a warrant requirement that was "clearly established" long before this Court addressed the national security warrant question "for the first time" in *Keith* (407 U.S. at 299). To support this conclusion, the district court cited (App., *infra*, 64a-66a) this Court's holding in *Katz* that nontrespassory surveillances generally require warrants absent exigent circumstances, as well as the concurring opinion of Justice Douglas, joined by Justice Brennan, which the district court stated "should have provided particular guidance to [petitioner] and all other attorneys regarding the constitutionality of warrantless domestic national security wiretaps" (App., *infra*, 65a). The court also concluded (*id.* at 64a) that "the Justice Department had reason to know that its position regarding the need for a warrant was subject to both question and attack" because the constitutionality of the surveillance involved in *Keith* had been challenged in a motion filed in the underlying criminal proceedings "more than one month prior to the Attorney General's authorization of the [Davidon] wiretap" (App., *infra*, 64a). Finally, the court concluded (*id.* at 67a) that "the Attorney General's action was in direct conflict with the language, legislative history and purpose of Title III."

The district court held that petitioner was liable for the alleged violations and set the case for an evidentiary hearing "to determine whether the plaintiff is entitled to punitive damages and/or compensatory damages" (App., *infra*, 76a).[5] In a later ruling, the court declined to certify its order for interlocutory appeal (*id.* at 44a-50a).

4. Petitioner appealed under 28 U.S.C. 1291 and also filed a petition for mandamus, contending that his claims of absolute and qualified immunity had been wrongly denied. Respondent moved to dismiss the appeal for lack of a final,

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[5] The district court also held that trial was required on the question of the liability of the two FBI employees who actually intercepted respondent's conversations pursuant to the Attorney General's authorization. Respondent subsequently dismissed his claims against the FBI employees.

appealable order. A motions panel of the court of appeals denied this motion in part (App., *infra*, 31a-43a). The panel held (*id.* at 34a, 43a) that denial of a claim of absolute immunity is immediately appealable and referred the question whether a denial of qualified immunity was appealable as a collateral order to the merits panel. The motions panel stayed further proceedings below, noting that a trial on punitive damages would involve an inquiry into petitioner's motivation and the advice he received from subordinates in the Department of Justice that might be "as searching as the trial on the merits would have been" (*id.* at 34a). The motions panel further noted (*id.* at 33a n.2) that the district court's ruling on the state of law in 1970 and 1971 governing domestic security wiretaps differed from that of the District of Columbia Circuit in *Sinclair* v. *Kleindienst*, 645 F.2d 1080 (1981).

In the decision that we now seek to have reviewed, the merits panel first held (App., *infra*, 8a-12a) that petitioner was not entitled to absolute immunity. This Court's intervening decision in *Harlow* had recognized (457 U.S. at 812) that absolute immunity might be justified "to protect the unhesitating performance" of vital functions by government officials responsible for decisions in "such sensitive areas as national security or foreign policy." However, the court of appeals declined to address this portion of the *Harlow* opinion. Instead, the court observed (App., *infra*, 9a-12a) that *Harlow* had not changed the analysis of absolute immunity in *Butz* and that petitioner's claim of absolute immunity under the *Butz* analysis had been "'*sub silentio* rejected'" in the court of appeals' prior opinion.

The court of appeals then held (App., *infra*, 12a-15a) that the denial of petitioner's claim of qualified immunity was not appealable under the collateral order doctrine. The court expressed the fear (*id.* at 15a) that accepting jurisdiction over this issue would "subject our colleagues to unnecessary additional burdens by opening the sluice gates." The court denied petitioner's mandamus petition "for the same reasons" *(ibid.)*.

Judge Weis dissented (App., *infra*, 15a-29a). Agreeing with decisions of the District of Columbia and Eighth Cir-

cuits, he first concluded (*id.* at 16a-20a) that the collateral order doctrine permits an immediate appeal when a claim of qualified immunity is denied on the ground that the legal standard allegedly violated was clearly established at the time in question.

Turning to the merits of the qualified immunity issue, Judge Weis reviewed at length (App., *infra*, 20a-28a) the state of the law in 1970 and early 1971 regarding warrantless national security wiretaps and concluded that "[u]nquestionably, a prohibition against warrantless searches in these circumstances was not 'clearly established'" (*id.* at 28a).

On the issue of absolute immunity, Judge Weis noted (App., *infra*, 20a) that the claim then before the court, based on the Attorney General's special functions in the area of national security, was different from the claim, based on *Imbler* v. *Pachtman*, *supra*, that had been reviewed in the prior appeal. He wrote that "*Harlow's* discussion of the 'special functions' test, as it might apply to the Attorney General in cases implicating national security, lends a force to the defendant's argument here that was lacking in *Forsyth I*" (App., *infra*, 20a). Judge Weis did not address the absolute immunity issue further, however, in light of his conclusion that petitioner was entitled to qualified immunity *(ibid.)*.

A petition for rehearing and suggestion for rehearing en banc was denied on April 3, 1984, with four of the ten active judges voting to rehear the case en banc (App., *infra*, 81a-82a).

REASONS FOR GRANTING THE PETITION

This case presents important and unsettled questions concerning the immunity of government officials who are sued for damages based upon the performance of official acts. Contrary to decisions of three other courts of appeals, the court below held that the collateral order doctrine does not permit an appeal when a claim of qualified immunity is rejected on purely legal grounds. This holding will frustrate one of the chief purposes of qualified immunity, *i.e.*, the prompt termination of insubstantial *Bivens* suits.

Contrary to a decision of the District of Columbia Circuit on virtually identical facts, and another district court decision involving the very same wiretap, the district court in this case held that petitioner's conduct violated "clearly established" legal standards and thus does not merit qualified immunity. This unsupportable holding, which the court of appeals refused to correct on appeal or mandamus, deserves review and reversal so that this meritless litigation will terminate.

Finally, the court below, while recognizing that the Attorney General, like all other government lawyers, is absolutely immune when performing even the most mundane prosecutorial functions, held that the Attorney General has no unqualified immunity when he makes critical decisions regarding national security. This potentially dangerous holding also merits review.

1. The court of appeals refused to consider petitioner's entitlement to qualified immunity. Holding that the district court's denial of petitioner's claim to qualified immunity was not a final appealable order under 28 U.S.C. 1291, the court dismissed this aspect of the appeal. This dismissal of the qualified immunity appeal conflicts with *Krohn* v. *United States*, No. 83-1839 (1st Cir. Aug. 22, 1984); *Evans* v. *Dillahunty*, 711 F.2d 828 (8th Cir. 1983), and *McSurely* v. *McClellan*, 697 F.2d 309 (D.C. Cir. 1982), and is based on a misapplication of the collateral order doctrine articulated in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).[6]

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[6] In *Bever* v. *Gilbertson*, 724 F.2d 1083 (4th Cir. 1984) (rehearing denied by equally divided court), petitions for cert. pending, Nos. 84-25, 83-2139, the court held in a case involving state officials that the rejection of a qualified immunity claim is not appealable where there are overlapping claims for injunctive relief that would require trial in any event. There are no such overlapping claims in this case.

In *Benford* v. *American Broadcasting Companies, Inc.*, No. 83-1168 (4th Cir. Apr. 11, 1983), cert. denied, No. 82-2145 (Oct. 3, 1983), the court held in an unpublished opinion that the collateral order rule did not permit an appeal from an order denying qualified immunity where "the disappointed movants [could] still present facts at trial in support of their immunity defense" (82-2145 Pet. App. 9A). In this case, by contrast, petitioner's immunity claim has been conclusively rejected, and liability has been imposed.

In *Cohen*, the Court held that certain interlocutory orders are immediately appealable under 28 U.S.C. 1291. To fall within the *Cohen* rule, an order must "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated" (337 U.S. at 546). See also, *e.g.*, *Flanagan* v. *United States*, No. 82-374 (Feb. 21, 1984), slip op. 6; *Nixon* v. *Fitzgerald*, 457 U.S. 731, 742 (1982); *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978). Applying this rule, the Court has repeatedly held that orders denying claims of absolute immunity are appealable. *Nixon* v. *Fitzgerald*, 457 U.S. at 741-743 (claim of immunity for the President); *Helstoski* v. *Meanor*, 442 U.S. 500, 506-508 (1979) (claim of immunity under Speech or Debate Clause); *Abney* v. *United States*, 431 U.S. 651, 656-663 (1977) (claim of immunity under the Double Jeopardy Clause); see *Harlow* v. *Fitzgerald*, 457 U.S. 800, 806 n.11, 813-820 (1982) (considering both absolute and qualified immunity questions on a collateral order appeal).

An appeal should likewise be allowed in the present case, where petitioner's claim of qualified immunity was rejected on the ground that petitioner's undisputed conduct violated a legal standard that was "clearly established" at the time in question. The order rejecting petitioner's claim meets all of the requirements of the collateral order doctrine. First, it conclusively settled petitioner's entitlement to qualified immunity and indeed established his liability. Trial of the remaining issue of damages will not affect those determinations. Second, the issue of qualified immunity is of unquestionable importance, as *Harlow* pointed out (457 U.S. at 814), because it protects public officials from the burdens and distractions of meritless lawsuits. In addition, the question of qualified immunity, which depends upon whether the applicable legal standard was clearly established in 1970 and 1971, is quite separate both from the issue of whether the petitioner's conduct violated the Fourth Amendment, which was settled in *Keith* in 1972, and from the question of damages, which, as the motions panel ob-

served, turns on the very inquiry into subjective intent that this court sought to avoid by announcing a new qualified immunity test in *Harlow*.

Third and most important, if the denial of a qualified immunity claim must await final judgment, the defendant official's right to avoid trial on meritless claims will be irretrievable lost. *Krohn* v. *United States*, slip op. 9-11. In *Harlow*, this Court revised the qualified immunity standard to provide, as a matter of strong public policy, that government officials should not be subject "either to the costs of trial or to the burdens of broad-reaching discovery" where they have not violated clearly established rights (457 U.S. at 817-818). As the dissenting judge below recognized, under *Harlow* "avoiding trial through prompt disposition of insubstantial claims by summary judgment is as compelling an objective in cases properly invoking qualified immunity as in those where absolute immunity is available" (App., *infra*, 18a). Consequently, "[i]t follows inexorably that withholding appellate correction of erroneous pre-trial denials of qualified immunity frustrates *Harlow's* purpose in revising the test" *(ibid.)*.

The court of appeals in this case was unwilling or unable to come to grips with the clearly established rules governing the collateral order doctrine. Instead of considering whether those rules are satisfied by the denial of a qualified immunity claim under *Harlow*, the court rested upon its prior treatment of the issue of appealability, which antedated *Harlow's* reformulation of the qualified immunity defense (App., *infra*, 12a-14a). The court also protested (*id.* at 14a-15a) that its docket was already "crushing" and suggested that qualified immunity claims had been entertained in interlocutory appeals in *Harlow* and *McSurely* only because the claims were "insubstantial."

These arguments are plainly unsound. *Harlow* significantly changed the standard for qualified immunity, and three courts of appeals have concluded, in light of that change, that the denial of a qualified immunity claim is appealable. The Third Circuit's refusal to reconsider its prior ruling on appealability in light of *Harlow* was unjustified. Likewise, the court's crowded docket is not a legitimate

ground for refusing to entertain an appeal as of right under 28 U.S.C. 1291.[7] And there is no hint in *Harlow* or *McSurely* that the appeals were entertained in those cases only because the merits of the plaintiffs' claims had been prejudged and found to be insubstantial. Nor are we aware of any precedent for such a procedure in appeals under 28 U.S.C. 1291.[8]

The present case strikingly shows why the denial of qualified immunity claims should be appealable. It is obvious—as the D.C. Circuit has held, as another district court has concluded in a case involving the same wiretap at issue here (see page 14, *infra*), as Judge Weis demonstrated in dissent below, and as we will show—that the illegality of warrantless domestic national security wiretaps was *not* clearly established in 1970 or early 1971. The district court reached the contrary conclusion on untenable grounds but refused to certify this dispositive question for appeal under 28 U.S.C. 1292(b). The court of appeals refused to entertain petitioner's appeal under the collateral order doctrine, refused to address the well established rules governing such appeals, and denied petitioner's mandamus petition without explanation, thereby subjecting petitioner to an unnecessary and potentially protracted trial on the issue of his subjective good faith. The prospect of such treatment will "'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties'" (*Harlow*, 457 U.S. at 814 (citation omitted)).

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[7] Moreover, as the dissent recognized, district court docket pressures also are important, and "[s]ound judicial administration argues against declining a meritorious appeal when the result is to require a district court to hold a useless trial" (App., *infra*, 28a).

[8] The court of appeals in this case found that respondent's claims were not insubstantial solely because the district court had concluded that petitioner had violated a clearly established legal standard (App., *infra*, 14a). The court of appeals did not examine the merits of the district court's determination. Thus, by the court of appeals' reasoning, a *Bivens* defendant will never be allowed to appeal when a qualified immunity claim is denied on purely legal grounds. In all such cases, the district court will have held that a clearly established legal standard was violated, and the plaintiff's claims will accordingly be deemed substantial.

The appealability of orders denying qualified immunity is an important question on which the courts of appeals are in conflict. Resolution by this Court is needed and warranted.

2. Because it held that it lacked jurisdiction, the court of appeals did not review what may be the most egregious aspect of the district court's decision, the rejection of petitioner's qualified immunity claim. In the district court's view, this Court's opinion in *Katz* "clearly stated more than three years before the installation of the Davidon wiretap that a warrant was required for such electronic surveillance" (App., *infra*, 70a). Consequently, petitioner was held liable because he "ignore[d] what the Supreme Court [in *Katz*] has previously determined to be a requirement of the Constitution" (*ibid.*).

The district court's error is manifest and not open to serious question. In *Katz*, this Court expressly reserved decision on whether a warrant was required for national security surveillances. 389 U.S. at 358 n.23. Five years later, when the question was decided in *Keith*, the Court began by acknowledging (407 U.S. at 299 (emphasis added; footnote omitted)) that "[s]uccessive Presidents for more than one-quarter of a century have authorized such surveillance in varying degrees, *without guidance from the Congress or a definitive decision of this Court.*" The Court added (*ibid.*): "This case brings the issue here for the first time."[9]

Prior to *Keith*, the lower courts were divided on the question. See *United States* v. *United States District Court*, 444 F.2d 651, 656 & n.2 (6th Cir. 1971) (citing cases). And when petitioner authorized the surveillance at issue here, "the sparse lower federal court case law *unanimously* supported the theory that no warrant was required in national security cases" (App., *infra*, 23a) (emphasis added) (Weis, J., dissenting).

The district court's conclusion that petitioner violated clearly established law is plainly wrong. As the dissenting judge below noted, "a review of Supreme Court and other

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[9] The Court similarly noted (407 U.S. at 309) that it was "address[ing] a question left open by *Katz*, *supra*, at 358 n.23."

federal court decisions, the statutory provisions, and scholarly commentary all demonstrate that the law of warrantless electronic surveillance in national security cases was only beginning to develop in 1970-71" (App., *infra*, 27a-28a).

In *Sinclair* v. *Kleindienst*, 645 F.2d 1080, 1084-1085 (1981), the District of Columbia Circuit held that petitioner did not violate a clearly established standard when he authorized wiretaps that terminated in January 1971, shortly *after* those at issue here. In *Zweibon* v. *Mitchell (Zweibon IV)*, 720 F.2d 162 (D.C. Cir. 1983), petition for cert. pending, No. 83-2005, the court held that the illegality of such warrantless wiretaps was not clearly established in March or July 1971. Recently, another district court judge in the Eastern District of Pennsylvania reached the same conclusion in another case concerning the same wiretap at issue here. *Burkhart* v. *Saxbe*, Civ. Action No. 74-826 (E.D. Pa. Aug. 23, 1984) (VanArtsdalen, J.). (App., *infra*, 143a-154a). See also *Weinberg* v. *Mitchell*, 588 F.2d 275 (9th Cir. 1978) (holding that *Keith* was not "clearly foreshadowed" and therefore should not be applied retroactively for damages purposes).[10] As a consequence, petitioner's entitlement to at least a qualified immunity is clear under *Harlow*.

The district court's reasoning is as disturbing as its ultimate conclusion. In the district court's view, an Attorney General must heed the most fleeting harbingers of change in constitutional doctrine if he is to avoid personal liability. The court faulted petitioner because "more than one month prior to the Attorney General's authorization of the wiretap at issue in this case" a defense motion filed in the district court proceedings that gave rise to *Keith* should have given "the Justice Department * * * reason to know that its position regarding the need for a warrant was subject to both

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[10] The District of Columbia Circuit has held that *Keith* was foreshadowed by *Katz*. *Zweibon* v. *Mitchell (Zweibon III)*, 606 F.2d 1172, 1178-1181 (D.C. Cir. 1979), cert. denied, 453 U.S. 912 (1981), but the court later pointed out that "the 'clearly established' test for immunity purposes" is not "coterminous with the 'clearly foreshadowed' test courts employ to determine whether a judicial decision ought to be given retroactive effect." 720 F.2d at 172; see also *id.* at 172-173.

question and attack" (App., *infra*, 64a).[11] Petitioner also was faulted for failing to accept the views expressed in Justice Douglas's concurring opinion in *Katz*, which Justice Brennan joined. The district court wrote (App., *infra*, 66a):

> [I]n 1967, the *Katz* majority opinion and two concurrences should have clearly alerted defendant Mitchell that electronic surveillance such as the Davidon tap was subject to the warrant requirement of the Fourth Amendment. Instead of seeking to obtain a warrant for the Davidon tap, defendant Mitchell and his aides gambled that Justice White's position [in another concurring opinion in *Katz*] would be accepted if the Court were to be faced with this issue in an actual case rather than a hypothetical debate. The Justice Department lost the gamble in *Keith*.[12]

The Attorney General cannot be subject to such restrictions. It is absurd to suggest that the Attorney General should require discontinuation of an investigative technique simply because it has been challenged by a defendant in a criminal case. By that reasoning, criminal investigations would come to halt. Nor should the Attorney General be required, at risk of personal liability, to follow individual expressions of views by a minority of this Court, especially where, as in *Katz*, other members of the Court express

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[11] The district court went on to conclude (App., *infra*, 64a) that "[a]fter January 24, 1971, the government had overwhelming reason to know that its conduct was unconstitutional" as a result of the district court's decision in *United States* v. *Sinclair*, 321 F. Supp. 1074 (E.D. Mich. 1971), granting the defense motion noted above. This decision occurred *after* the Davidon surveillance, however, and the court ignored the two previous district court decisions holding that no warrant was required for domestic security surveillances. See *United States* v. *United States District Court*, 444 F.2d at 656 n.2.

[12] The district court also concluded that "the Attorney General's action was in direct conflict with the language, legislative history and purpose of Title III" (App., *infra*, 67a). This conclusion ignores the clear holding of *Keith* that "Congress only intended to make clear [by adding the national security proviso, 18 U.S.C. (1976 ed.) 2511(3)] that the Act simply did not legislate with respect to national security surveillances." 407 U.S. at 306 (footnote omitted).

seemingly contrary views.[13] Because the decision of the district court has a chilling effect on the conduct of the Attorney General's most central functions, review by this Court is justified to provide guidance to lower courts that must determine when a right becomes "clearly established" under *Harlow's* immunity inquiry.

3. The lower courts also erred in rejecting petitioner's claim of absolute immunity. In *Butz* v. *Economou*, 438 U.S. at 508, this Court held that "[a]lthough a qualified immunity from damages liability should be the general rule for executive officials charged with constitutional violations, [the Court's] decisions recognize that there are some officials whose special functions require a full exemption from liability." The Court stated (*ibid.* (quoting *Imbler* v. *Pachtman*, 424 U.S. at 421)) that this determination requires "'a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it.'"

In *Harlow* (457 U.S. at 812), this Court listed decisionmaking in the area of foreign policy and national security as a "special function" that might well justify absolute immunity. The Court wrote (*id.* at 812 & n.18):

> For aides entrusted with discretionary authority in such sensitive areas as national security or foreign policy, absolute immunity might well be justified to protect the unhesitating performance of functions vital to the national interest. * * * Cf. * * * *Katz* v. *United States*, 389 U.S. 347, 364 (1967) (White, J., concurring) ("We should not require the warrant procedure and the magistrate's judgment if the President of the

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[13] In *Zweibon IV*, the court of appeals similarly rejected the plaintiffs' attempt to "'poll' the Supreme Court Justices on the scope of the national security exemption as of 1970" (720 F.2d at 172). The *Zweibon IV* court stated *(ibid.)*:

> Even ignoring the inherent difficulties and imprecision that must attend any "vote" based on statements made in other decisional contexts, appellants' "poll" proves nothing, since it applies a different test from that expounded in *Harlow*. The test for qualified immunity is "clearly established," not "clearly foreshadowed." The distinction is self-evident.

United States *or his chief legal officer, the Attorney General*, has considered the requirements of national security and authorized electronic surveillance as reasonable") (emphasis added).

The Court also noted that "a derivative claim to Presidential immunity [by a President's designee] would be strongest in such 'central' Presidential domains as foreign policy and national security, in which the President could not discharge his singularly vital mandate without delegating functions nearly as sensitive as his own" (457 U.S. at 812 n.19).

In this case, the court of appeals refused to heed *Harlow's* admonition and did not even consider whether the Attorney General's weighty responsibilities in the area of national security might constitute a special function justifying the protection of absolute immunity. Instead, the court rested upon its prior opinion holding that the Attorney General is entitled to absolute immunity only when he acts in a prosecutorial role. The court of appeals' refusal to recognize the Attorney General's absolute immunity in the sensitive and important area of national security may have dangerous consequences in future cases. Because of the importance of this issue, review by this Court is warranted.

Absolute immunity is justified in cases such as this so that government officials entrusted with the responsibility of protecting the country from foreign and domestic threats will not hesitate to discharge their responsibilities out of fear of personal liability. "In the governmental structure created by our Constitution, the Executive is endowed with enormous power in the two related areas of national defense and international relations." *New York Times Co.* v. *United States*, 403 U.S. 713, 727 (1971) (Stewart J., concurring); see also *id.* at 741 (Marshall, J., concurring); *id.* at 756-758 (Harlan, J., dissenting); *id.* at 761 (Blackmun, J., dissenting). Furthermore, "the President of the United States has the fundamental duty, under Art. II, § 1, of the Constitution, to 'preserve, protect, and defend the Constitution of the United States.' Implicit in that duty is the power to protect our Government against those who would subvert or overthrow it by unlawful means." *Keith*, 407

U.S. at 310. Thus, this Court has recognized "the constitutional basis of the President's domestic security role" (*id.* at 320), as well as the vital importance of that role (*id.* at 312):

> It has been said that "[t]he most basic function of any government is to provide for the security of the individual and of his property." * * * And unless Government safeguards its own capacity to function and to preserve the security of its people, society itself could become so disordered that all rights and liberties would be endangered.

The importance of preserving the President's discretion, and that of his designees, in this sensitive and critical area has long been recognized by this Court in decisions that steadfastly have maintained that "[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention." *Haig* v. *Agee*, 453 U.S. 280, 292 (1981); see also *United States* v. *Nixon*, 418 U.S. 683, 710 (1974). When the President's designee performs national security functions, absolute immunity is required because here, perhaps more than with any other function, hesitation resulting from fear of personal liability carries grave risks to the nation as a whole and can least be tolerated.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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